BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DARREN LEWIS, Claimant, v. CAMPBELLS QUALITY EXTERIORS, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 03-513374** **05-006961** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed November 7, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Idaho Falls on April 5, 2006. Claimant was present and represented by Dennis R. Petersen of Idaho Falls. Monte R. Whittier of Boise represented Employer/Surety. Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. The parties then submitted post-hearing briefs and this matter came under advisement on August 21, 2006.

ISSUES

As agreed to by the parties at hearing, the issues to be decided are:

1. Whether Claimant complied with the notice limitations contained in Idaho Code § 72-701 through 706 and whether those limitations were tolled pursuant to Idaho Code § 72-604;

2. Whether Claimant suffers from a compensable occupational disease;

3. Whether and to what extent Claimant is entitled to medical care; and

4. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that his bilateral knee condition was caused by his work as a siding installer because he was required to crawl on planks and climb ladders.

Defendants contend that there is no condition in Claimant's right knee that requires treatment and that the condition of Claimant's left knee is the result of a condition he was born with, and the inflammation he experiences is merely due to hard work, not an occupational disease.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing.

2. Claimant's Exhibits 1-20 admitted at the hearing.

3. Defendants' Exhibits A-D admitted at the hearing.

4. The post-hearing deposition of Gregory Biddulph, M.D., taken by Claimant on May 12, 2006.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 41 years of age and resided in Idaho Falls at the time of the hearing. He began working for Employer's siding business as a sider's helper in 1984 and eventually

became a siding installer. The work involves climbing on ladders and, at times, crawling along planks attached to ladders in order to install sheets of siding.

2. Claimant injured his right knee in June of 2003. He developed bursitis and was off work for a few days. Surety accepted the claim and paid for his medical treatment. Claimant's right knee bursitis resolved.

3. In May of 2004, Claimant's left knee began to bother him. He continued to work through the summer, but by September 2004, the pain got to the point where he decided to seek medical treatment.

4. On September 23, 2004, Claimant presented to Michael K. James, D.P.M., a podiatrist. Claimant thought that he might have fallen arches that may be contributing to his bilateral knee pain. Dr. James fashioned an arch support out of tape as a diagnostic tool to determine if orthotics might be appropriate. When informed that the taping alleviated Claimant's symptoms to a certain extent, Dr. James authored a letter to Claimant's health insurance carrier recommending orthotics. Before acting on Dr. James' recommendation, Claimant came under the care of Gregory Biddulph, M.D., an orthopedic surgeon.

5. Claimant first saw Dr. Biddulph on November 17, 2004, for an evaluation of his left knee. Dr. Biddulph erroneously noted that Claimant had had prior bursitis in that knee but it had resolved. Claimant complained of pain in his left knee with ladder climbing and kneeling beginning in May. Upon examination, Dr. Biddulph diagnosed a possible medial meniscus tear and quadriceps insertional tendinitis for which he recommended stretching, icing, and anti-inflammatories. For the possible meniscus tear, he recommended an MRI that was accomplished and revealed a large meniscus tear for which Dr. Biddulph recommended surgery. Claimant did not want surgery at that time as he was busy and needed to work to get his bills paid.

6. Claimant returned to Dr. Biddulph on May 25, 2005, at which time he was ready to have his knee scoped. Claimant was concerned that he was developing pain in his right knee secondary to favoring his left knee. Dr. Biddulph ordered an MRI of Claimant's right knee to rule out a meniscal tear. The MRI did not reveal a tear, but rather a small ganglion cyst within the ACL.

7. On July 5, 2005, Dr. Biddulph performed a left knee arthroscopy, synovectomy, and excision of medial synovial plica. He did not observe any meniscal tear at surgery. Claimant's post-operative course included physical therapy. By March 10, 2006, Claimant's left knee was still sore but the pain was different than before surgery in that it was more migratory within the knee. Dr. Biddulph opined that the pain was due to inflammation, as he could find no structural cause.

DISCUSSION AND FURTHER FINDINGS

Notice:

Idaho Code § 72-448 requires written notice of an occupational disease be given within 60 days of its first manifestation and a claim filed within one year of its manifestation. Manifestation means the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform an injured worker that he or she has such a disease. Idaho Code § 72-102(19). Here, Claimant was not even aware that he had an injury to his knees until so informed by Dr. Biddulph on November 22, 2004; he originally thought he may have fallen arches that somehow contributed to his knee pain. According to the electronically filed Notice of Injury and Claim for Benefits, Claimant notified Employer on November 24, 2004, and the Referee so finds. Defendants' Exhibit A, p. 3. Claimant filed his Complaint on July 7, 2005,

within one year of the manifestation of his alleged occupational disease. His Complaint was timely filed.

Occupational disease:

As in industrial accident claims, an occupational disease claimant must prove a causal connection between the condition for which compensation is claimed and the occupation to a reasonable degree of medical probability. Langley v. State of Idaho, Special Indemnity Fund, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995).

Pertinent Idaho statutes in effect at the time of the alleged contraction of Claimant's occupational disease include Idaho Code §72-102(22) which defines occupational diseases and related terms as follows:

> (a) "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.
>
> (b) "Contracted" and "incurred" when referring to an occupational disease, shall be deemed the equivalent of the term "arising out of and in the course of" employment.
>
> (c) "Disablement," except in cases of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.

Idaho Code §72-437 defines the right to compensation for an occupational disease:

> When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, or in case of his death, his dependents shall be entitled to compensation.

Lastly, Idaho Code §72-439 provides:

> An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment.

8. As it turned out, Claimant's left knee MRI that indicated a torn meniscus was in error. The condition found at surgery was a large medial synovial plica band that Dr. Biddulph defined as follows:

> A plica or a synovial plica is a fold in the synovium, and we all have them, but some are small and some are big. And they're an embryological remnant of when we were developing in utero. Our knee was once divided into separate compartments, top and bottom, and then those compartments fused together, and it leaves a cleft, or a plica, on each side. Some are small and very flexible, pliable. Others are very thick and big and catch.

Dr. Biddulph Deposition, p. 9-10.

9. Dr. Biddulph presumed that it was the synovial plica that was causing Claimant's symptoms. He removed it, as it had no function in any event. Dr. Biddulph testified that Claimant could have tweaked or twisted the plica band to make it symptomatic, but there is no evidence that that happened.

10. Dr. Biddulph explained Claimant's continuing left knee pain as follows:

> I felt that the pain was secondary to tendonitis. It goes back to the very first time I saw him when we felt he did have the medial-sided pain, but then, also, this other pain up on the top of his knee cap and around that area. I think that Darren does have inflammatory pain in his knee, and I always like to try to explain that.
>
> To me, the pain is either inflammatory pain or mechanical pain. Inflammatory pain can happen to a normal knee where it just gets inflamed and irritated in the soft tissue. Mechanical pain would be if he did have a torn meniscus or a torn ligament or something that required, you know, repair.

Dr. Biddulph Deposition, pp. 14-15.

11. Regarding the need for surgery, Dr. Biddulph testified:

> Q. (By Mr. Petersen): Okay. Doctor, on June 21st, I sent you a letter asking for your opinion regarding the symptoms of his left knee, and I explained to you and in my letter what I understood Mr. Lewis to do on the job. And I brought some pictures that we used at the hearing today – or the other day. And this – if I can see which way they go here. Here we go.
>
> This is the area, like, where he works, where he has to climb up the ladder and then when they talk about kneeling down, he has to crawl through. And you [*sic*] testified that's what he does on the job.
>
> In my letter to you, I think I used 15 to 20 times an hour that he has to climb the ladder. In his testimony at the hearing, it could be 20 to 30 times, but not without – not crawling so much, but more putting that left knee down when he climbed up there. Do you still – is that your opinion still today, that the symptoms in the left knee are related to the work that he does?
>
> A. I think that the tendonitis, the soft-tissue inflammation symptoms clearly are secondary to his work. I think that the plica band that was there was there – that's something he was born with. Certainly, he could have injured that or thickened it from a twisting or tweaking injury. Sometimes if you have a plica that gets pulled on or strained, it will then thicken and become more prominent.
>
> Q. Okay. And is it your opinion, based upon a reasonable degree of medical probability, that the need for the surgery was related to his work?
>
> A. Yes. The need for the surgery was persistent pain that I felt was brought on by his work, plus the supplemental MRI that, in hindsight, was not correct, which sometimes occurs in medicine.

Dr. Biddulph Deposition, pp. 15-17.

12. Dr. Biddulph also testified that Claimant's tendinitis and synovial plica could also be aggravated by hard work without any accident.

13. The Referee finds Dr. Biddulph's testimony to be somewhat internally inconsistent. If the plica band was causing Claimant's symptoms and there is no evidence that it was "tweaked or twisted", what about Claimant's work would have caused the plica to become symptomatic? Dr. Biddulph also testified that Claimant's condition could have resulted from " . . . hard labor, normal labor work, walking, running." Dr. Biddulph Deposition, p. 20.

14. The Referee finds that crawling on planks and climbing ladders are not activities unique to the siding business. The conditions of employment must result in a hazard that

distinguishes itself from the general run of occupations. *See, Bowman v. Twin Falls Construction Company*, 99 Idaho 312, 581 P. 2d 770 (1978). As examples, plumbing, carpet laying, construction work in general, welding, electrical work and drywalling all involve climbing ladders and crawling to some extent. As pointed out by Defendants, hard work is not an accident. *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004). By inference, neither should hard work constitute an occupational disease. Claimant's condition arose out of his personal circumstance of a synovial plica band, not his employment.

15. Claimant has failed to prove he suffers from a compensable occupational disease.

16. Based on the above finding, the remaining issues of medical care and attorney fees are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he suffers from a compensable occupational disease.

2. The remaining issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __27th ___ day of __October___, 2006.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __7th __ day of __November___, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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